

P R O C E E D I N G S

Tape 1

0034

(On record - 9:00 a.m.)

CHAIRMAN COTTEN: Good morning. This is the Alaska Public Utilities Commission. It's the 27th of August, approximately 9 o'clock. Present are Commissioners Cook, Posey, Hanley and I believe Ornquist by teleconference from Nome. Are you there, Commissioner?

COMMISSIONER ORNQUIST: I sure am.

CHAIRMAN COTTEN: And myself, Sam Cotten. The first item on our agenda is, as usual, the opportunity for the public to make comments on any topic. Are there members of public who wish to speak? Apparently not. The second item is our Consumer/Public Information Report from our director, Agnes.

MS. GILES: Good morning, Commissioner -- Chairman Cotten, Commissioners. You were distributed a copy of the statistical report for the Consumer Protection Section and I won't go over the numbers unless you have some specific questions about them. The total number of calls, however, for the month was 738, which is a little bit down, but still a significant number of calls.

Of the complaints we received, the garbage complaints were outstanding. Those concerned Anchorage Refuse and those had to do with the deregulated rates for dumpster service and

R & R COURT REPORTERS

810 W STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 the contract that was distributed to the dumpster customers.
2 And, as you are aware, we initiated a docket of investigation
3 into that matter. Since that time, Staff and ARI has
4 stipulated and that matter is pending.

5 We also received a number of telephone complaints and
6 those had to do with -- quite a number of them had to do with
7 quality of service issues; either actual static interference,
8 outages or a number of them had to do with response time that
9 utilities took to respond to issues that were raised to them by
10 their consumers.

11 And then the third highest number of complaints we
12 received concerned electric complaints and those were
13 disconnects, estimated bills and a few of them had to do with
14 line extension policies.

15 On a different note, other things happening within the
16 section. As you are aware, beginning around the first part of
17 this month, the Consumer Protection Section started to limit
18 the amount of time that we would take telephone calls directly
19 from consumers and we've implemented the reduced schedule for
20 taking calls from 8:00 in the morning until noon; however,
21 there are a number of exceptions and so far we still seem to
22 have a pretty full day of phone calls. But, hopefully, we will
23 not inconvenience any consumer and we will achieve the goal
24 that we're trying to achieve and that is to get some of the
25 behind-the-scene work done without spending the entire day on

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 the phone and, hopefully, this shouldn't affect any other area.
2 We've given explicit instructions to the switchboard so that
3 these calls should not go on to any other staff person or to
4 any commissioner. And, certainly, if you find that you are
5 getting more calls than you feel you should get or calls that
6 are out of the ordinary, we'd like to know about it because
7 that is not the intent to shift that burden on to any other
8 section.

9 Also, yesterday we mailed out about 230 letters to all
10 of the regulated and unregulated utilities and other interested
11 entities notifying them that the Consumer Affairs conference
12 has been canceled. It was with much agony that the decision
13 was made. I was a part of the Consumer Affairs conference from
14 the very beginning, so it was very dear to me and I felt that
15 there was some really good networking and information that was
16 passed along with that conference, but it was probably the only
17 thing that we could scratch, given the fact that we're now
18 responsible for the annual report coordination and the increase
19 of the other activity within the section. So, it was with
20 reluctance and regret that we notified these utilities that
21 it's been canceled.

22 Speaking of the annual report, I did send a friendly
23 reminder to all of Staff last evening just urging everyone to
24 get their part in, the part that their responsible for in doing
25 the annual report. Hopefully, we can get the parts in and get

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 it produced and then move on to other business. I don't have
2 anything else and I'll answer any questions that you may have.

3 COMMISSIONER POSEY: Ms. Giles, what we're doing here
4 is probably a transition, but I will let you know that the
5 Lower 48, 49 states, Consumer Affairs, and that is the ability
6 to get information out to consumers during this period of
7 change in telecommunications, electricity and everything else,
8 it's driving other commissioners to get more involved in making
9 sure that the consumers understand the process, are taken care
10 of during the process, so we'll have to look at ways to make
11 sure that this coming year we take a look at how to help the
12 utilities understand the consumer interest and understand our
13 interest in taking care of the consumers, big, little and
14 small, through this process of change that we'll continue to go
15 through for the next three to five years.

16 CHAIRMAN COTTEN: The only thing that jumps out at me
17 on your report, which the way you put it together is real easy
18 to read and you kind of get a snapshot pretty quickly, but it
19 looks like the big change between this year and last year is
20 the number of informal complaints that have been opened. Was
21 last year an anomaly? I mean was that lower than normal or is
22 there a running average? It seems like you're almost double
23 the number of informal complaints from last year.

24 MS. GILES: Well, we feel like we've been working
25 almost double of what we did last year. Actually, these

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 numbers are not what they used to be a few years ago and there
2 was a transition period where we were without a chief for the
3 section and we had an interim chief that was coming up to
4 speed, so our numbers were low and our numbers are now reaching
5 and surpassing what they were a few years ago. I see them
6 steadily climbing.

7 CHAIRMAN COTTEN: Is there any one thing or number of
8 things to which you attribute that?

9 MS. GILES: The telecommunications, I believe,
10 contributes quite a bit to that. We have a lot of inquiries
11 from consumers asking everything from how do I know which
12 carrier to choose, how many carriers are there, how many
13 choices do I have, and with the new rules of -- a lot of the
14 rates now are implemented after 30 days' notice, there's not
15 that review of the rates and consumers are quite puzzled at how
16 rates can go into effect without an actual approval process, so
17 that's generated a number of questions.

18 CHAIRMAN COTTEN: Just another example of how
19 deregulation probably won't achieve one of the goals some
20 people had in mind of less work on a commission and less need
21 for a regulatory body. It looks like the more deregulation,
22 the more work there is for us to do.

23 MS. GILES: Well, the good news, I think, is that they
24 do have choices now in areas that they didn't have choices
25 before and that also brings along with it a responsibility of

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 shopping around.

2 CHAIRMAN COTTEN: Anything else? Thank you very much.

3 MS. GILES: You're welcome.

4 CHAIRMAN COTTEN: Okay. The next item is a petition by
5 GCI for -- regarding the legality of one of our regulations.
6 We have a report from Staff and we also have -- I believe it is
7 available to the public as well -- a report from Mr. Zobel,
8 Assistant Attorney General, on the subject. So, I think we
9 should ask Ms. Kenyon to make whatever remarks or presentation
10 that she would like at this point.

11 MS. KENYON: The regulation involved has to do with
12 restrictions on where a long distance carrier can build in our
13 rural areas of the state. At issue is whether 3 AAC 52.355 is
14 preempted by the Act. As far as I can tell, it's pretty much
15 agreed that this regulation of ours violates Section 253(a),
16 but at issue is whether it's an allowable exemption under
17 253(b) and there's a dispute on this point. GCI says, no, it's
18 not an allowable exemption and, therefore, our regulation is
19 contrary to the Act and various -- some of the local carriers
20 assert that 253(b) provides the Commission with authority to
21 continue to regulate and have 3 AAC 52.355 on the books. A lot
22 depends on whether or not you consider our state regulation to
23 be sufficiently competitively neutral under 253(b) to be an
24 allowable exemption. That's basically where the decision line
25 is. If you believe that it's competitively neutral, then it

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 would appear to be that 253(b) says, well, competitively
2 neutral regulations can go into effect that are in the public
3 interest and they're allowable exemptions under (a), but Staff
4 believes it's not competitively neutral and we're recommending
5 that you not enforce this regulation because it's contrary to
6 the Act.

7 If you don't take any action on this point, then those
8 parties who feel that our regulation is contrary to the Act can
9 go to the FCC and seek their case there and the FCC, if it
10 believes it's a preempted issue, they can overturn our state
11 regulation.

12 There's a variety of other side issues that have been
13 filed on this case. Staff believes that for the most part they
14 can't be addressed easily at this docket. You have the options
15 of moving them to various other dockets if you want to deal
16 with them in more detail. We are willing to elaborate on that
17 to any degree you'd like.

18 CHAIRMAN COTTEN: I'm sure there will be some
19 elaboration. Could you remind us quickly the FCC rules on the
20 same subject?

21 MS. KENYON: The FCC has restrictions, one of which
22 says that they do not allow duplicative satellite facilities to
23 be built in several of -- most of the rural areas of Alaska.
24 That's a long-standing rule that came into being in the early
25 '80s and it's been in effect ever since. There's a petition

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 for review of that at the FCC, but the FCC has not acted on it.

2 CHAIRMAN COTTEN: How long has that petition been in
3 front of the FCC?

4 MS. KENYON: I believe it's been in front of them for
5 over seven years. They filed it, I believe, in 1990, early
6 1990, and it was filed by GCI.

7 CHAIRMAN COTTEN: Has there been renewed activity on
8 that petition since the Telecom Act passed?

9 MS. KENYON: No, not that I'm aware of. The last
10 contact I had with the FCC on this matter was well over a year
11 and a half ago. No, I take it back. It was probably six
12 months even or a year before the Act passed that they called me
13 up and said, well, we have this outstanding petition and they
14 just wanted to talk about it a little bit and, frankly, I don't
15 even think that they -- they didn't seem like they were going
16 to take any action on it at that time, but I don't -- I guess I
17 can't really tell you where they're at except that the FCC has
18 a full plate on other matters and I'm not sure this is their
19 highest priority.

20 CHAIRMAN COTTEN: The Act is clear that the state is
21 prohibited but not the FCC.

22 MS. KENYON: That is correct. And as another issue, I
23 think there's probably some dispute as to -- between Staff and
24 Alascom. I'm not going to go into it here because it's a
25 subject of another case, but there's some dispute as to what

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 carrier of last resort responsibilities Alascom has at the
2 federal level as well. So, that is another point, that the FCC
3 may or may not require Alascom to be a carrier of last resort
4 regardless of what you do on this matter. That's not been an
5 issue that's been explored much in this case. It's something
6 maybe just to keep in the back of your mind. Staff dealt with
7 this as a legal issue and not as a policy issue, so we don't
8 really have a full recommendation as to what you should replace
9 355 with if you decide to get rid of it.

10 CHAIRMAN COTTEN: Well, there's a lot of terms involved
11 here, like, for example, uneconomical duplicative facilities.
12 If a determination were made that there were such facilities,
13 uneconomically duplicative, then, in your opinion, would it be
14 possible that they would threaten the advancement of universal
15 service or threaten any rights of consumers or the continued
16 quality of telecommunications services? I'm not sure that 254
17 mentions it, but affordable rates.

18 MS. KENYON: Well, if I'm not mistaken, the economist
19 would say you shouldn't have uneconomic duplicative facilities
20 because that means everybody else's costs go up. Now, the
21 other side of that coin is that some people believe that
22 they're willing to pay a little bit more for a choice. So, it
23 comes down to what do you want to pay to have another carrier
24 in town so that you can make a choice. In a place like an
25 urban area like Anchorage, it's a little easier decision to

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 make than if you're in Egegik or Kwethluk and you know how much
2 more perhaps it might cost to serve there, at least you may
3 after GCI's 50 site demonstration project is further under way
4 and has had a chance to demonstrate whatever it's going to
5 demonstrate.

6 CHAIRMAN COTTEN: Well, the 253(a) suggests that we
7 can't prohibit the ability to provide a service, but it doesn't
8 specifically say that we can't provide a prohibition on
9 construction. So, it comes down to do they have the ability to
10 provide a service. There isn't a requirement that we allow
11 additional construction as long as we're satisfied that they're
12 able to provide the service.

13 MS. KENYON: I may have to refer to Ron Zobel on this.
14 My gut reaction is that you're correct, that it's service. If
15 you can provide all the services without needing to construct,
16 then you're okay. However, it's -- many times, when you talk
17 to the FCC, they sort of feel that if you can't construct
18 facilities, it's anti-competitive.

19 CHAIRMAN COTTEN: Well, I think the competitive -- I
20 mean there's that other phrase in there, competitively neutral,
21 that sort of hinges this whole question. So, how do we define
22 competitively neutral? I suppose there's a lot of ways to do
23 that. For example, in another type of utility -- for example,
24 in Anchorage here, you've got -- Enstar's got gas lines running
25 around, but somebody else could still compete in the provision

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 of natural gas service because they can use Enstar's
2 facilities. So I think some would suggest that you can still
3 compete and offer services because you can use the existing
4 facilities. So, therefore -- I'm not suggesting this, but I
5 think that that logic has been advanced and, therefore, it is
6 competitively neutral. So, I think that we should understand
7 which services wouldn't be available under these circumstances.
8 I think you've mentioned a couple here.

9 MS. KENYON: GCI asserts that the two services that it
10 cannot provide using Alascom's facilities, or at least it's
11 very difficult to provide, are medical images, if you want to
12 transmit medical images, or if you want remote access to
13 medical records. Now, they also claim that there are
14 innovative new services for which they don't really elaborate
15 on that cannot be provided over the Alascom network or that
16 there is a possibility that if they can't build their own
17 facilities, they're at least limited by what's out there. So,
18 to some degree, they're correct. I mean Alascom's network
19 can't do everything for everybody. That's physically
20 impossible. There's always a possibility that some service
21 that someone may want just can't be provided with the existing
22 network.

23 CHAIRMAN COTTEN: Finally, the other thing that I
24 thought was worth discussing was the comments from AT&T/Alascom
25 about their concern of the continued obligation to be the

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 carrier of last resort. Even though you make it real clear
2 that you believe this is a legal issue and that that ought to
3 be considered separately, I think we shouldn't just ignore
4 potential consequences or consequences suggesting that 355
5 shouldn't be enforced. We should at least know what's going to
6 happen and be as prepared as possible.

7 MS. KENYON: And Staff agrees with that. We believe
8 that you need to understand the consequences and formulate your
9 own position as to what you would like to do given that 355 may
10 go away. One of the choices you have is to investigate, well,
11 should we have facilities competition out there because you
12 might be able to influence the FCC in its decision. The FCC
13 still retains jurisdiction over those satellite -- duplicative
14 satellite ERT stations.

15 And also our own interstate -- intrastate market and
16 how the interexchange market works given that 355 has gone away
17 -- would go away. One of the options that Staff had discussed
18 is to open a separate docket to deal with generic intrastate
19 interexchange market issues that would be separate from --
20 separate but in some ways connected with the current strategy
21 to have a market structure docket open. But what we believe is
22 that the market structure docket that we've talked about in the
23 past is mainly centered around a lot of the local exchange
24 carrier issues and most of those are urban in nature, while the
25 interexchange carrier issues for the most part are rural in

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 nature, so we felt there was a natural dichotomy between the
2 two and perhaps would make more sense that you address them
3 separately.

4 But at the same time we still have to figure out how to
5 prioritize these things because we can't do them all at one
6 time because of work load. Our inclination would be to
7 concentrate more on the local issues than on the interexchange
8 issues. For example, they could start on the same track at the
9 same time, but one would be on a faster track than the other.
10 We would need guidance from you as to how you want us to
11 prioritize. There's more interexchange issues than just the
12 ones that are raised here.

13 CHAIRMAN COTTEN: I don't know if anybody else wanted
14 to jump in, so I'll take a breath here.

15 COMMISSIONER ORNQUIST: Mr. Chairman?

16 CHAIRMAN COTTEN: Commissioner.

17 COMMISSIONER ORNQUIST: Thank you. Lorrie, I have a
18 question for you regarding the economical portion of other
19 facilities going in. If it's possible to serve an area with
20 better service and using new technology, would that qualify as
21 something that would be allowed under the Act or what?

22 MS. KENYON: I'm not sure I'm following the question
23 because the Act is saying basically what you can't do, not
24 necessarily what you can do. So, if the APUC decided to open
25 up rural areas state wide to advance better technology, it

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 could do so. The FCC would still have its restriction in
2 place, but you could petition them and say we think it's a bad
3 idea and you should lift it and I would bet they'd listen to
4 you.

5 COMMISSIONER ORNQUIST: I think I said my question
6 incorrectly there, Lorrie. When I said the Act, I really meant
7 the rule that the FCC has.

8 MS. KENYON: Yes. I believe that you could always
9 petition the FCC. Any party can. GCI did in the past to put
10 in new equipment as in the public interest and GCI succeeded
11 before the FCC, so they have an open mind on this. But the
12 issue is still out there and you'd have to seek waiver from the
13 existing provisions and policies at the FCC level. It's not
14 just automatically assumed that you'd get it.

15 COMMISSIONER ORNQUIST: Right. Would that then be on a
16 case-by-case basis at this point?

17 MS. KENYON: At this point, it could be on a case-by-
18 case basis or GCI has a pending petition for exemption of the
19 entire thing. So, it's actually -- if the APUC wished to, it
20 could do it. It could -- it depends on what the APUC wants to
21 do as far as how it would like to advise the FCC. You have the
22 -- you could send them a letter or a petition saying we think
23 we should waive the whole thing or you could send them a letter
24 or a petition that says we still have our doubts and we still
25 think you should do this on a case-by-case basis. It's the

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 FCC's choice how they wish to respond. They could do it either
2 way.

3 COMMISSIONER ORNQUIST: I'm sorry. Maybe there's a
4 piece in here that I'm missing. Is it the FCC that is not
5 allowing people to go or competition out in certain areas or is
6 it regulation that we have?

7 MS. KENYON: Both. For ours, it's all -- pardon me.
8 There's a large number of rural sites that we prohibit. For
9 the FCC, it's limited to satellite. That means you could --
10 for the FCC, they'll let you build a microwave shot, but they
11 won't let you build duplicative satellite.

12 COMMISSIONER ORNQUIST: Okay. Thank you, Mr. Chairman.
13 I appreciate the answer to the question, Ms. Kenyon.

14 COMMISSIONER HANLEY: I have a little bit more of a
15 generic question. In preparing these telecommunications memos,
16 do you often or frequently or whenever have access to our
17 consultant before making these recommendations?

18 MS. KENYON: In this case, I had no access to our
19 consultant. For my memos, I haven't been involved in the cases
20 where I had a lot of access to the consultant. It's usually
21 been Phil or Lou that have been dealing with them directly and
22 formulating their recommendations.

23 COMMISSIONER HANLEY: That's fine. Thank you very
24 much.

25 CHAIRMAN COTTEN: Commissioner.

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 COMMISSIONER POSEY: Ms. Kenyon, I've read a number of
2 things on competitive neutrality and it appears that no one
3 really has a firm definition as to what it means. A lot of
4 opinions, but.....

5 MS. KENYON: I have not researched the matter.
6 However, in my mind, I'm not sure it can be competitively
7 neutral if you don't have an aspect of competition. If you
8 don't have facilities-based competition, then, in my mind, I
9 have a hard time understanding how it can be competitively
10 neutral. It's a little bit like pornography. You know it when
11 you see it and everybody obviously has different opinions.
12 Obviously, there's a lot of people who have commented in this
13 case whose opinion on competitive neutrality is different from
14 mine.

15 COMMISSIONER POSEY: I see it as an evolving definition
16 based on situations and time because it doesn't -- it can't
17 mean the same thing to each state, let alone the rural versus
18 the urban areas.

19 MR. ZOBEL: Commissioner, if I could just comment on
20 that for a moment. I don't think it's necessary in judging
21 this particular regulation to come up with an abstract
22 definition of competitive neutrality. In fact, what you just
23 suggested in your last statement, that you have to look at what
24 facts you have and look at the specific instance before you
25 here.

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 This regulation says that one utility can do these
2 things. In analyzing this, I had a great difficulty in
3 imagining how that could be any more clearly not competitively
4 neutral. I mean you've got one player able to do one very
5 important aspect of providing service and everybody else can't.
6 So, in this particular instance, I think we -- this seems to be
7 an instance where this will be instructive as to what
8 competitive -- not meeting competitive neutrality would mean in
9 the future and then we should judge the next case or look at
10 the next case.

11 That also is related to the notion in looking at this.
12 If this kind of regulation doesn't fall under 253, I have a lot
13 of difficulty coming up with one that would be clearly
14 violative of it. It is a state and local regulation that
15 prohibits the provision of particular services. I think the
16 fact that there are other ways -- the idea of reselling. It's
17 my understanding that that is not economic and, therefore, that
18 is why there's desire to compete by constructing facilities.

19 You'll notice the section says has the effect of
20 prohibiting. So, if the effect is to create an economic
21 situation where no one else can provide that service, then it
22 seems like this is the paradigm of what Congress had in mind
23 when it said state and local government shouldn't be doing
24 this.

25 I approach preemption questions very conservatively and

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 certainly our department does. It is not easy to say that a
2 state regulation that is preempted by the federal shouldn't be,
3 but here we had explicit preemption. We didn't have to glean a
4 lot from the whole system as you would under other doctrines of
5 occupation in the field or implied preemption. Here you've got
6 -- it was a rather stark statute.

7 We also have to assume that Congress didn't just take
8 away in 253(b) what they put in 253(a). I mean to read 253(b)
9 as broadly as some in this docket have urged. What I would
10 suggest would make what Congress did in 253(a) almost
11 meaningless, and that is -- and when you construe a statute,
12 you have to assume that they were trying to do something here.

13 As to the carrier of last resort matter, I would just
14 point out that that certainly is not a prohibition. I mean
15 maybe there's a problem with that and a policy problem and I
16 didn't deal with that, but that's a requirement that service be
17 provided, so it really doesn't fall under 253(a) and that's why
18 it wasn't dealt with here.

19 MS. KENYON: One point that was made in GCI's comments
20 is they've quoted an FCC decision where, basically, I'll
21 paraphrase it. The FCC, in that decision, believed that
22 allowing one carrier to provide service in an area and
23 excluding all others was not competitively neutral.

24 CHAIRMAN COTTEN: You noted that here with the local
25 exchange service and with a pay telephone service and I keep

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 going back to the difference between providing a service and
2 constructing facilities and there's a difference here. I think
3 that the prohibition is on service, not on construction.

4 So, to Mr. Zobel, I think that a better -- a case where
5 it would certainly apply is when the ability for a provider to
6 provide local exchange service, that's a violation of 253(a).
7 Or a prohibition against providing pay telephone service. That
8 was obviously prohibited by 253(a). So, that's where it comes
9 down to. To me, it's can the service be provided.

10 MS. KENYON: One of the services that you can't provide
11 if you don't let them build is wholesale services. That means
12 you're preventing them from selling their own facilities.

13 CHAIRMAN COTTEN: Right. I understand that. I'm sorry
14 if I've interrupted you. There was another -- this is sort of
15 a little circular, but if you decide that you're concerned
16 about things like -- I'm trying to find 254(b). If you're
17 concerned about universal service or public safety or some
18 other result of allowing uneconomical duplicative facilities,
19 but you get stuck on this competitively neutral problem, is
20 there a way to not redefine competitively neutral, but make a
21 change that would make it competitively neutral? I think one
22 of the people commented or made a suggestion here -- TelAlaska
23 suggested that the wholesale services that Alascom now charges
24 are in some cases higher than retail rates. I don't know. Do
25 you think that's a fair characterization of AT&T/Alascom's

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 wholesale tariff?

2 MS. KENYON: I think that you can find some routes and
3 some -- on some calls where if you were to price it out, the
4 wholesale rate would be higher than the retail rate. As to
5 whether fixing the wholesale tariff will alleviate your legal
6 problems under the Act, I'm not so sure.

7 CHAIRMAN COTTEN: I'm not talking about alleviating.
8 I'm not trying to be devious and alleviate a legal problem.
9 I'm trying to figure out a way if it's possible to make
10 something competitively neutral. If you want to protect the
11 public safety or universal service or affordable rates or these
12 other things that might be threatened by uneconomic duplicative
13 facilities.

14 MS. KENYON: All I can say is I couldn't figure out a
15 way of doing that without getting rid of 355. You may be able
16 to modify it by saying safe and efficient facilities by fit,
17 willing and able carriers are all able to work out and build
18 out in the Bush, but I'm not sure you could do much more than
19 that. I don't know how to fix it. I don't know how to
20 Band-Aid it.

21 CHAIRMAN COTTEN: Band-Aid?

22 MS. KENYON: I don't know how to put a Band-Aid on 355
23 to make it competitively neutral by doing other things like
24 changing the wholesale tariff or whatever. There's no action I
25 could recommend to you on that regard.

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 CHAIRMAN COTTEN: Yeah, I don't have any bright ideas
2 on it either other than, you know, the steps you have to go
3 through in order to make this decision. You want to make sure
4 that you aren't threatening the things that 254 suggest you
5 ought to be concerned with, but you also have to remain
6 competitively neutral. So, my question is how do you remain
7 competitively neutral? Maybe you can't do that, but I think we
8 ought to at least examine those possibilities.

9 MS. KENYON: Well, if you're worried about the reasons
10 why you put our regulation into effect and how you can achieve
11 the same goals in a competitively neutral manner, you probably
12 can do that. There are some ways which are easier and some
13 ways which are harder. The whole gamut ranges from going to
14 the FCC and saying keep your restriction in place because, by
15 God, we need it, to saying we don't need that restriction in
16 place, but we're willing to put in subsidy mechanisms and
17 redefine or change how we do our regulations to make sure that
18 customers in the Bush still have high quality service. But
19 it's not a question that's easily answered here. It's a very
20 complex subject. The last time we tried to address it, it took
21 a long time to figure out how to set up the market to keep our
22 rural areas with service. To do so now isn't something that I
23 think we're going to be able to figure out at this public
24 meeting. It's going to take a lot of effort.

25 COMMISSIONER COOK: In talking to you yesterday,

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 Mr. Zobel, and what I gathered from what you said earlier to
2 Mr. Posey.....

3 COURT REPORTER: Can you get closer to the microphone?

4 COMMISSIONER COOK: Sorry. What I gathered from what
5 you said to me and Commissioner Posey, we really cannot just
6 give a blanket statement from this Commission that we're going
7 to not enforce 3 AAC 52.355. That actually takes a -- we would
8 have to repeal that and wouldn't have to look at it on a case-
9 by-case basis until that happened. Is that my understanding of
10 what you were saying?

11 MR. ZOBEL: I've suggested that you could declare that
12 it's unenforceable and recognize that there's a successful
13 defense to its enforcement, which would be -- I think I would
14 estop you from enforcing it in the future. And then I've
15 suggested that you should -- didn't move with deliberate speed
16 to repeal it. The proper way to take a regulation off the
17 books is to repeal it under the Administrative Procedures Act.

18 I was speaking to the alternative choice that was
19 suggested, which was a general waiver, which, in my opinion, is
20 when you waive a regulation for everyone, it could possibly
21 apply to -- you have repealed it and we have a procedure for
22 doing that.

23 So, the interim is -- that question was a little bit
24 difficult. What would it mean in the interim? I believe if
25 you declared it to be unenforceable, then you would be bound by

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 that and you shouldn't do that unless you intend to be bound
2 and then initiate the proceedings to repeal it. All of that is
3 -- and, of course, I'm talking about assuming you agree with
4 the original proposition.

5 COMMISSIONER COOK: In regards to this specific
6 instance with GCI, that would be a -- we could waive it
7 specifically for them if we chose to.

8 MR. ZOBEL: Well, I think that you would have to have
9 -- you have to make a finding. You know, we had a very long
10 hearing here over just a partial waiver and I believed that the
11 procedure for waiver requires that kind of finding. Because of
12 the use of the statute that says you can exempt a utility or
13 class of utilities when you make a finding that it's not in the
14 public interest, that implies some kind of factual inquiry,
15 which you're not really doing today in considering this
16 petition. So, I would stay with the original comment that if
17 the effect here is to recognize -- if what you want to do is to
18 recognize that this is preempted by federal law and, therefore,
19 is -- can't be enforced for that reason, then you're not doing
20 that just on behalf of one carrier. If you want to go the one
21 carrier route, then you have not really made the fact-finding
22 that we have made in the past and I think you should make in
23 the future in waiving it for a particular company.

24 Now, if I may, there was one other thing I wanted to
25 comment on and that is would there be a way, for example, on

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 safety to do something and be competitively neutral and I would
2 -- nothing in what I said should be received as meaning that
3 you could not, after proper inquiry, prohibit any one utility,
4 including GCI, from doing something that is unsafe. If there's
5 a problem with the DAMA stations and that can be established,
6 you could prohibit GCI from putting them in once you've made
7 that finding. You could aim it at a utility that's being
8 unsafe. There's nothing I said is intended to rob you of the
9 ability to act in a specific situation. Now, we know what the
10 facts are. There aren't that many carriers that this applies
11 to. I dealt with the problem in the abstract, whether this
12 regulation is preempted by this federal statute, and you could
13 act to protect safety.

14 COMMISSIONER COOK: I'd like to continue on this
15 preemption issue, Mr. Zobel, and, I guess, Ms. Kenyon. I guess
16 where I'm at is GCI filed a petition requiring that 3 AAC
17 52.355 was invalid and at this point we're looking at whether
18 the real question at this juncture is whether we have been
19 preempted, our regs have been preempted by the Telecom Act.
20 Did the commentators address that particular issue of
21 preemption?

22 MS. KENYON: They spoke extensively on that 253(b) side
23 and some said we have authority under 253(b) as what we have in
24 place is sufficiently competitively neutral and you have public
25 interest reasons to deal -- to maintain our existing state reg,

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

1 while primarily GCI said, no, 253(b) doesn't allow that because
2 our state reg is not competitively neutral. The commentators
3 went to great degrees to talk about what they considered to be
4 public interest reasons why you should preserve our existing
5 state reg.

6 COMMISSIONER COOK: I guess the question is, did they
7 speak directly to preemption? In your memo you discuss a lot
8 of issues, but I guess the core issue at this point is I hear
9 what Mr. Zobel is saying is we can declare it's unenforceable
10 because we take the position that we've been preempted. Well,
11 I guess I want to be sure that all the issues regarding
12 preemption have been flushed out by the commentators.

13 MS. KENYON: I'm not sure I understand your question
14 because I'm not sure what you mean by preemption. I think that
15 what has been stated in the comments -- I'm not sure what
16 you're asking, so I'm sort of fishing here. One of things that
17 GCI said is that if we don't take any action to declare this
18 unenforceable, they will seek preemption from the FCC or they
19 may have implied it. I'm not sure if they came out point blank
20 and said they would, but there is a certain implication there
21 that they have the option of going to the FCC and saying look
22 at this state reg, it's violating the Act and we want the FCC
23 to preempt it. Is that in line with what you're.....

24 COMMISSIONER COOK: From what I'm understanding
25 Mr. Zobel to say is that the basis for declaring that 3 AAC

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515